

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3320 OF 2018

Hemlata Anandrao Deshmukh & Ors. ... Petitioners

Vs.

Nandkishor Sambhajirao Deshmukh & Ors. ... Respondents

.....

Mr. Milind Deshmukh for the Petitioners.

Mr. Uday B. Nighot for Respondent Nos.1 to 5.

Mr. Shailesh A. Chavan for Respondent Nos.7 to 12.

.....

CORAM : M. S. KARNIK, J.

DATE : 4th SEPTEMBER, 2019.

P. C.:

1. Heard learned counsel.
2. The petitioners are the heirs of Anandrao S. Deshmukh-original defendant No.2 in the Regular Civil Suit No.109 of 1998 filed by the original plaintiffs for partition and separate possession. In answer to issue No.2, the Trial Court held that the plaintiff Sambhajirao, defendant No.1 Shivajirao, defendant No.2 Anandrao, defendant Nos.3 to 5 have equal 1/6 th share each in the suit property. They are sons of deceased Sahebrao Deshmukh. Sambhajirao, Shivajirao and Anandrao are also no more and their

heirs are on record. The Trial Court observed that suit property is to be partitioned by metes and bounds as per their respective 1/6 th share.

3. Learned counsel for the petitioners who are legal heirs from the branch of defendant No.2-Anandrao and also from the branch of defendant Nos.3 to 5 would submit that the Trial Court while allowing the suit for partition has decreed that petitioner Sambhajirao is entitled to partition of his separate 1/6 th share in the suit property. It is not in dispute that the decree has been executed and Sambhajirao is in possession of his 1/6 th share in the suit property.

4. Learned counsel for the petitioners submits that having regard to the findings of the Trial Court in answer to issue No.2, the Trial Court obviously should have directed the petitioners are entitled to their separate 1/6 th share in the suit property as well. According to learned counsel, the Trial Court having held that parties are entitled to 1/6 th share each, the decree entitling the petitioners also to their separate share should have followed as a logical consequence.

5. The petitioners therefore filed Miscellaneous Civil Application No.8 of 2013 below Exhibit 46 before the Trial Court under Sections 152 and 153 of the Code of Civil Procedure for correction of omission in the original decree. The said application came to be rejected by the Trial Court by the impugned order as the petitioners did not file appropriate application immediately after the decree was passed in the year 2008.

6. None has appeared on behalf of the respondent No.6 though he is duly served. In so far as respondent Nos.1 to 5, who are the legal heirs of original plaintiff, the decree has been executed and they are already in possession of their 1/6 th separate share of the suit property.

7. Having regard to the findings of the Trial Court in answer to issue No.2, it is obvious that there is an omission on the part of the Trial Court to state in the decree that even the defendants are entitled to 1/6 th share each in the suit property. While allowing the suit for partition the Trial Court already held that the property has to be partitioned by metes and bounds

and that the sons of deceased Sahebrao i.e. the plaintiff and defendant Nos.1 to 5 are entitled to 1/6 th share each. The Miscellaneous Civil Application No.8 of 2013 therefore deserves to be allowed and is accordingly allowed.

8. The petition is allowed in the above terms. The decree is modified in terms that plaintiff, defendant No.2, defendant Nos.3 to 5 are entitled to partition and separate share of 1/6 th share in the suit property.

9. It is however made clear that the possession of the plaintiff over the 1/6 th share which is already in their possession shall not be disturbed while partitioning the remaining suit property.

(M. S. KARNIK, J.)